In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1695

JAMES D. ECKMAN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITIONER'S REPLY TO OPPOSITION

on the brief:
R. John Mock
Youngstown, Ohio

Counsel for Petitioner
CARMEN A. POLICY
City Centre One
P.O. Box 837
Youngstown, Ohio 44501
Telephone: 216-746-3217

We respectfully request that this Reply be distributed because of the (1) nature of the Opposition Brief and (2) decisions and petitions recorded after we filed our petition in this case. Rule 24 (4) (5).

The Government raised the question of whether we established a peg for review in the court below. They seek to put us to the "hard test" in the collateral precincts as they argue in opposition in Scharf v. United States, No. 76-1611, [Gov. Brief p. 5, n. 1]. In doing so, they overlook a recorded judgment in this criminal case, which is absolutely devoid of the safeguards established by Congress and this Court.

In the court below, we claimed that:

> Where there was a plea bargain in a federal criminal case setting forth conditional probation in lieu of execution of two years imprisonment, the defendant is entitled to specific performance of that agreement. If that agreement is uncertain, ambiguous or not clearly understandable, the plea bargain is untenable and a court on review ought to examine the whole record and determine whether the entire agreement should be set aside. If upon such an examination the reviewing court finds that the sentence and conviction cannot stand muster under Rule 11, Fed. Rules of Crim. Proc., the sentence imposed at a probation revocation proceeding was entered without jurisdiction and it must be vacated, the case remanded and instructions issued requiring further proceedings in the trial court.

The trial court record of the probation revocation proceeding will show that Eckman's lawyer argued that the Government did not show that there was any criminal activity which would trigger the trial court's power to revoke probation.

And we argued that the misunderstanding by Eckman was manifest upon review of the whole record. But the court held otherwise, saying there was not abuse of discretion and further held:

> "that there was no violation of the provisions of Rule 11, Federal Rules of Criminal Procedure." (our emphasis) Pet. App. A-8.

In any event, whether direct or collateral, it is far more appropriate, whenever possible to correct errors reachable by the appeal rather than remit petitioner to a new collateral proceeding. Cf. Barton v. United States, 375 U.S. 52, 54 (1963); United States v. Rosenbarger, 536 F. 2d 717, 722 (6th Cir. 1976).

Under the substantial compliance test advocated in United States v. Brogan, 519 F. 2d 28 (1975) in the court below, the majority seemed to be persuaded by the ON THE RECORD acknowledgement by Brogan that he stood advised by counsel.[1] Circuit Judge McCree[2] dissented holding that McCarthy v. United States, 354 U.S. 459, is mandatory; that "(t)here is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him." (519 F. 2d at 30).

While the record in the instant case indicates that counsel was present and bargained with the Government (Pet. App. A-12) the record is absolutely devoid of anything that might reach the Brogan test, the Rule 11, (c) [advice to the defendant], (d) [insuring the plea is voluntary], (f) [determine the accuracy of plea], or (g) [record . . . without limitation, the COURT'S ADVICE TO THE DEFENDANT . . . .], (all emphasis ours). Inter alia, how can this record be urged as one which adequate(ly) complies with Rule 11, [Govt. Brief p. 4] when

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[1] 519 F. 2d at p. 29:

THE COURT: All right, Brogan, you have heard Mr. Fink, your attorney, advise the Court that he has discussed this matter with you?

BROGAN: Yes, sir.

THE COURT: Has he explained your rights to you?

BROGAN: Yes, sir.

* * *

And you thoroughly understand the charge in Count Two you are going to plead to?

BROGAN: Yes, sir, I do.

* * *

[2] Hon. Wade McCree, then Circuit Judge, now Solicitor General of the United States of America.

the record is silent as to whether Eckman had the advice and explanation of rights by his lawyer [Brogan, supra] or the COURT'S ADVICE [Rule 11 (g)]? We respectfully contend it is not and cannot be assumed to be even slight compliance with Rule 11 and when the Court below held, after review of the whole record, there was no violation of the new Rule 11, it came in conflict with the Second and Fourth Circuits in United States v. Journet, 544 F. 2d 633 and United States v. Boone, 543 F. 2d 1090. Moreover, it departed in substance from its own decision in Brogan, supra, and violated this Court's mandate in McCarthy, supra.

We opt for an extension of the McCarthy mandate — that Rule 11 proceedings be conducted with the same solemnity as a trial to court in federal criminal proceedings. Anything less than that makes a farce and mockery of this Court's mandate and the mandate by Congress. We urge that the Congressional mandate is the progeny of McCarthy-Boykin-Santobello.[3] It was the legislative response to a need signaled by this Court's reasoning in those cases. The need is manifest. See: Schraft, Petition for Cert., No. 76-1611, at p. 9.

Reliance upon the McCarthy-Boykin-Santobello cases teaches that doctrinaire presumption of regularity under Rule 11 proceedings no longer persuades where the RECORD is silent. We contend that when a plea bargain shows on the record without more, it was a coerced plea per se. Santobello (supra) dicta, is ample support for our conclusion that the plea bargain on the record does not excuse McCarthy, supra, compliance with Rule 11, because fundamental rights are at stake in State or Federal criminal proceedings. And when the accused goes to intentionally relinquish his fundamental rights, privileges and guarantees, it must be done in accord with accepted judicial and legislative safeguards. Rule 11, Fed. Rules of Crim Proc. (Dec. 1, 1975); McCarthy v. United States, supra; Boykin v. Alabama, supra; United States v. Journet, supra; United States v. Boone, supra; cf. Johnson v. Zerbst, 304 U.S. 458, 464, (1938).

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[3] McCarthy v. United States, 394 U.S. 459 (1969)
Boykin v. Alabama, 395 U.S. 238 (1969)
Santobello v. New York, 404 U.S. 257 (1971)

After we filed our petition, we found that the Fifth Circuit joined the Journet-Boone test by requiring literal compliance. United States v. Aldridge, 553 F. 2d 922 (5th Cir. 1977).

Hence, when Eckman's lawyer agreed with Government counsel (Pet. App. A-12) to a bargain, and the trial judge stated such to Eckman (Pet. App. A-14) to which he agreed, the post-judgment revocation of probation was the product of a broken bargain when something other than criminal activity was the peg for probation revocation. It is obvious that the inquiry raised at the threshold, a plea bargain situation. In the absence of a painstaking inquiry about that bargain (United States v. Aldridge, supra, 553 F. 2d at p. 923) it only served to demonstrate an impremissibly coerced plea.

Rule 11 (1975), is a method provided by Congress for specific proceedings other than trial on a criminal charge. One can no more expect that only a semblence of compliance appear on the record under the methodology provided than in a case where the Fifth Amendment or Fourteenth Amendment due process requirements are not manifest in the record.

The problems will not "disappear" as suggested by the Government (Govt. Brief at p. 7, Scharf, No. 76-1611) any more than problems disappeared within three years of the 1966 Rule. See United States v. Michaelson, 552 F. 2d 472, 476 (2 Cir. Mar. 31, 1977).[4] Whether Michaelson represents some sort of retreat from the same court's Journet decision seems to be expressly denied.

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[4] In addition to the Scharf case No. 76-1611, raised by the Government Brief, the following cases were filed in this Court raising a Rule 11 problem: Kearney v. United States, (CA 9) No. 76-1646; Riffe v. United States, (CA 5) No. 76-1748, But see: United States v. Aldridge, 553 F. 2d 922 (5th Cir. 1977); Hamilton v. United States, (CA 10) No. 76-1818).

If the Government's position [Govt. Brief, p. 5 n. 1] seems persuasive, and we strongly urge it is not, the petitioner will be put to an insurmountable burden below because the District Attorney for the Northern District of Ohio would argue that the Sixth Circuit had the last word on this record — the law of the case! They seek to foist an undue hardship on this particular petitioner since it is highly unusual for this Court to set-forth reasons for denial of review. Such a position, we respectfully claim, is untenable.

> Yet, we cannot ignore that the plea here was taken after the trial commenced and before Journet authoritatively construed the amendments to Rule 11, and in a context where Michaelson must have known his rights. Under these circumstances, we believe it would be a needless rigid construction of Rule 11 to hold that the guilty plea on this record must be set aside. Our decision therefore is not to be interpreted as overruling Journet in any respect, (522 F. 2d 477, 478).

While Michaelson sounds like a retreat from Journet, the Fifth Circuit took a firm stand under the new Rule 11, calling for literal compliance and a painstaking inquiry about any plea bargain. United States v. Aldridge, 553 F. 2d 922 (5th Cir. 1977).

Finally, the subject is ripe for review. It is not a malady that will disappear. Chief Judge Joseph S. Lord observed that pre-sentence data will not fill the gap in a Rule 11 record. United States v. Zampitella, 416 F. Supp. 604 (ED. Pa. 1976); neither will defendant's acknowledged possession of a copy of the indictment fill the knowledge-understanding gap in a Rule 11 record. See: United States v. Rex, 465 F. 2d 875; 876 (6th Cir. 1972).

The foregoing adds further justification for certiorari and review.

Respectfully submitted,

CARMEN A. POLICY
City Centre One
P.O. Box 837
Youngstown, Ohio 44501
Telephone 216-746-3217

On the brief:
R. John Mock
1001 Mahoning Bank Building
Youngstown, Ohio 44503
(216) 743-4184